IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 40 of 2003

For Approval and Signature:

HON'BLE MISS JUSTICE R.M.DOSHIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

ZAVERBEN RATILAL PARMAR & ANR.

Versus

FATANDAS CHELARAM BHARANI

Appearance:

1. Second Appeal No. 40 of 2003

MR MTM HAKIM for Appellants Nos. 1-2

Respondent in person

CORAM : HON'BLE MISS JUSTICE R.M.DOSHIT

Date of decision: 04/09/2003

ORAL JUDGEMENT

The appellants - defendants challenge the judgment and order dated 6th February, 2003 passed by the

learned Assistant Judge, Vadodara in Regular Civil Appeal No.55/2002 arising from the judgment and order dated 12th April, 2002 passed by the learned Civil Judge (S.D.), Vadodara in Regular Civil Suit No.1417/1986.

The dispute in the present matter relates to a small wooden cabin installed by the appellants defendants (hereinafter referred to as 'the defendants') on the land belonging to the plaintiff. According to the plaintiff, the plaintiff had permitted the defendant No.1 to place the said cabin without charging for the same on condition that the defendant No.1 shall remove the same as and when called upon to do so. Whereas the claim of the defendants is that the defendant No.1 was the tenant of the plaintiff. The space under the cabin was rented by the defendant No.1 for a monthly rent of Rs.70=00.

The plaintiff instituted Regular Civil Suit No.1417/1986 in the Court of learned Civil Judge (S.D.), Vadodara and prayed for eviction of the defendants from the suit property. According to the plaintiff the land in question belongs to the plaintiff. The plaintiff had constructed certain shops over the said land and had leased the said shops to the concerned tenants. There was some open land also. In the year 1976 the defendants, through a common friend, approached the plaintiff and requested him to allow the defendant No.1 to install a wooden cabin on the said open land to store the painting materials. The plaintiff, believing that the defendant No.1 lady was doing painting at her residence and needed some storage place, allowed the defendant No.1 to place wooden cabin around the size of 10' x 6' on the open land of his property on condition that the defendant No.1 shall remove the cabin as and when required. The plaintiff did not charge the defendant No.1 for the use of the suit space. However, the plaintiff learnt that the defendant No.2, the husband of the defendant No.1 who was an employee of the Indian Air Force, had been doing the painting business from the said cabin in the name and style of "Chetan Arts". The defendant No.2 was the trespasser on the suit space. The plaintiff, therefore, called upon the defendants to remove the said cabin. However, the defendants failed to remove the said cabin as demanded. Therefore, the suit.

The defendants contested the suit by filing their written statement Ex.13. It was admitted that the suit space was taken by the defendant No.1 in the year 1976. The defendants, however, denied that the suit space was taken for storing painting materials or that it was given free-of-charge. It was alleged that the suit space was

rented by the defendant No.1 for a monthly rent of Rs.70=00 for a specific purpose to place a wooden cabin and to run the business of painting. Though the defendant No.1 paid the rent regularly no receipts were issued by the plaintiff.

The defendant No.1 filed Misc. Civil Application No.244/1986 in the Court of Small Causes, Vadodara for fixation of standard rent. The learned Small Causes Judge, under the judgment and order dated 10th January, 1997, held that the defendant No.1 was the tenant of the suit space and that the standard rent of the suit space was Rs.70=00 per month. The said judgment was, however, reversed in Revision Application No.2/1997 by the learned Assistant Judge, Vadodara. Against the judgment of the learned Assistant Judge, Vadodara the defendant No.1 preferred Civil Revision Application No.1085/1999 before this Court. The said Revision Application, however, was permitted to be withdrawn under order dated 31st July, 2002 (Coram: D.P.Buch, J.). The said Revision Application was withdrawn in view of the suit pending before the Civil Court. The learned Judge observed that the Civil Court shall not be influenced by the judgments delivered either by the learned Small Causes Judge or by the learned Assistant Judge.

In support of the suit, the plaintiff gave his oral evidence and relied upon the agreement Ex.75. In support of the defence, the defendant No.2 gave oral evidence Ex.97. Relying on the evidence on record, the learned trial Judge was pleased to hold that the defendant No.1 was the licensee of the plaintiff. The learned Judge decreed the suit and directed the defendants to handover the vacant possession of the suit space. Feeling aggrieved, the defendants preferred Regular Civil Appeal No.55/2002, which came to be dismissed by the learned Assistant Judge, Vadodara under the judgment and order dated 6th February, 2003. Feeling aggrieved, the defendants have preferred the present Appeal.

Mr.Hakim has submitted that the plaintiff specifically pleaded a case of licence and relied upon agreement Ex.75. The plaintiff, however, has failed to prove agreement Ex.75. In absence of proof of agreement Ex.75 the entire case of the plaintiff shall fall through. The suit ought to have been dismissed. He has submitted that though the defendant No.1 admitted her signature on agreement Ex.75 she disputed the contents thereof. It was the specific case that the defendant No.1 did not know English and she was not explained the

contents of the said agreement. In the circumstances, it was the duty of the plaintiff to examine the attesting witness to prove the contents of the agreement Ex.75. In the submission of Mr.Hakim the Courts below have committed grave error by relying upon the contents of the agreement Ex.75. Mr.Hakim has next contended that the onus to prove licence or permissive user alleged by the plaintiff shall lie on the plaintiff. The plaintiff having failed to prove the factum of licence/permissive user, the suit could not have been decreed. Mr.Hakim has also relied upon the evidence given by the plaintiff in the cross-examination. He has submitted that the plaintiff is a businessman who has rented shops to the concerned tenants. He has several other litigations against his brother, tenants, etc. Thus, it is proved that the plaintiff is an educated person and is wordly-wise. Such a person would not give away property free-of-charge. The presumption, therefore, should be that of tenancy.

In support of his arguments, Mr.Hakim has relied upon the judgments of this Court in the matters of Girjashankar Prabhashankar Raval v/s. Manharlal Jetashankar Dave [1983(2) G.L.R. 1357] and of Shivkumar Atmaram v/s. State of Gujarat [1970 G.L.R. 281]. He has also relied upon the judgments of the Hon'ble Supreme Court in the matters of Dattatraya v/s. Rangnath Gopalrao Kawathekar, (dead) by his legal representatives and others [AIR 1971 S.C. 2548]; of Ramji Dayawala & Sons (P) Ltd. v/s. Invest Import [AIR 1981 S.C. 2085] and of Badri Naryanan and others v/s. Rajabagyathammal and others [(1996) 7 S.C.C. 101].

As recorded on 1st September, 2003, the plaintiff had appeared in person and had submitted his written submissions. He had submitted that he did not want to be personally heard. His written submissions be considered. The plaintiff has reiterated the pleadings before the trial Court and has supported the judgments of the Courts below.

In the matter of Girjashankar Prabhashankar Raval (supra), the plaintiff claimed that the suit room was given to the defendant as a licensee free-of-charge. The claim of the plaintiff was rejected by the trial Court. The trial Court hold that the defendant was the tenant in the suit room. In the First Appeal preferred before this Court, upholding the judgment of the trial Court, this Court observed that, "...It would, however, be very difficult to consider that the house was given rent-free or merely as an obligation without charging any rent in

the city of Ahmedabad in the year 1969."

Mr.Hakim has submitted that the said observation shall apply in all cases. It is not possible that anybody would give away property to another person free-of-charge. Such a claim shall not be believed. I do not agree with Mr.Hakim. In the said matter, this Court upheld the claim of tenancy of the defendant on evidence on record and not on mere presumption that nobody in city of Ahmedabad would give away the property free-of-charge. This judgment shall not lend support to the defendants.

In the matter of Shivkumar Atmaram (supra), this Court has held that filing of a document alone is not sufficient. Party producing the document shall also prove it in accordance with law and, unless so done, it cannot be read as evidence in a case against any person.

In the matter of Dattatraya (supra), the Hon'ble Court has held that, "...if it is pleaded that the party who signed the document did not know the contents of the document then it may in certain circumstances be necessary for the party seeking to prove the document to place material before the court to satisfy it that the party who signed the document had the knowledge of its contents."

In the matter of Ramji Dayawala (supra), in a similar issue the Hon'ble Supreme Court observed that, "...Undoubtedly, mere proof of the handwriting of a document would not tantamount to proof of all the contents or the facts stated in the document. If the truth of the facts stated in a document is in issue mere proof of the handwriting and execution of the document would not furnish evidence of the truth of the facts or contents of the document. The truth or otherwise of the facts or contents so stated would have to be proved by admissible evidence i.e. by the evidence of those persons who can vouchsafe for the truth of the facts in issue."

In the matter of Badri Naryanan and others (supra), similar is the view expressed by the Hon'ble Supreme Court.

As regards the proof of a document and the contents thereof there cannot be any dispute. In the present case, the signature of the defendant No.1 on the agreement Ex.75 had been admitted. However, the knowledge of the contents thereof had been specifically

denied. In the circumstances, the onus to prove the agreement and the contents thereof lay on the plaintiff. The plaintiff could have proved the knowledge of the contents of the agreement Ex.75 by examining the attesting witness Dr.Bhuptani. However, the plaintiff did not examine the said Dr.Bhuptani. In the circumstances, the said agreement cannot be relied upon to prove the licence in favour of the defendant No.1.

However, I am unable to agree with Mr.Hakim that moment the said agreement Ex.75 goes out of consideration the case of the plaintiff shall fall. It should be noted that the suit has not been based on the said agreement Ex.75. The plaintiff has supported the pleadings by his oral evidence. The reliance of the plaintiff is on oral evidence. Both the Courts below have believed the oral evidence given by the plaintiff. There is no reason why I should not believe the said evidence.

As to the tenancy claimed by the defendants, I must say that defendants have miserably failed to prove the tenancy. Since the plaintiff proved the licence/ permissive user claimed by him and since the defendants asserted the tenancy, the onus to prove tenancy lay upon the defendants. Admittedly, no rent note has been drawn in respect of the suit space. The defendants have failed to prove that the rent was paid to the plaintiff regularly every month. In fact, the defendant No.2, in his oral evidence, has not even stated that the defendant No.1 used to pay rent of Rs.70=00 per month or that such rent was being paid every month or where or how such rent was paid. Further, the allegation that it is the defendant No.2 who has been carrying on business of painting has not been denied. The defendant No.2 has admitted that he knows the painting work and off the office hours he attends the shop and helps his wife in the painting work. Admittedly, the suit space had been given to the defendant No.1 and not to the defendant No.2. The presence of the defendant No.2 on the suit space can be said to be that of a trespasser. Moreover, according to the defendants, the defendant No.1 has been given registration under the Bombay Shops and Establishments Act, 1948 for the business of painting in the name of "Chetan Arts" in the year 1979. The evidence supports the claim of the plaintiff that in the year 1976 the suit space was given to the defendant No.1 for storing the painting materials alone and that the business of "Chetan Arts" was started later on.

In view of the above evidence on record, the Courts below cannot be said to have erred in upholding

the claim of the plaintiff. Irrespective of the findings recorded by the Rent Court, there is no evidence whatever to prove the tenancy in favour of the defendant No.1.

In above view of the matter, the Second Appeal is dismissed with costs throughout. The interim stay stands vacated.

The learned advocate Mr.Hakim requests that appellants be allowed to occupy the suit space for a further period of six months so as to enable the appellants to arrange for a suitable alternative premises. The request appears to be just. The decree for possession passed against the appellants may not be executed till 29th February, 2004 on condition that both the appellants individually give an undertaking to this Court to the effect that they should vacate the suit space on or before 29th February, 2004 and shall handover the vacant possession of the suit space to the plaintiff on or before the said date. The appellants shall also give an undertaking that appellants shall not induct any person in the suit space or shall not part with the possession of the suit space in favour of any person. The appellant No.1 shall also undertake to pay the occupancy fee every month regularly as may be directed hereunder. Such undertakings shall be filed within three weeks from today. Copy of the undertakings shall be given to the plaintiff.

Commencing from 1st September, 2003 the appellant No.1 shall pay occupancy fee of Rs.500=00 to the plaintiff. Such fee shall be paid on or before 5th day of the next succeeding month. In the event, the appellants fail to handover the vacant possession of the suit space to the plaintiff on or before 29th February, 2004, commencing from 1st March, 2004 the appellant No.1 shall be liable to pay occupancy fee of Rs.750=00 every month. The payment of occupancy fee under this order shall not create a right of tenancy or of any other nature in favour of the defendants.

In the event, the appellants commit breach of any of the above referred conditions or the undertakings given before this Court, the plaintiff shall be entitled to execute the decree against the appellants.

(Ms. R.M.Doshit, J.)

/sakkaf